enactment [17] has provided that "A creditor before obtaining a judgment or decree for his claim may, whether such claim be due and payable or not, institute any suit which he might institute after obtaining such judgment or decree . . . .; and he may in such suit have all the relief in respect to said estate to which he would be entitled after obtaining a judgment or decree for the claim which he may be entitled to recover. * * *" The purpose of this remedy is to place the general creditor in the favorable position occupied by the lien creditor. But the privilege of going at once into equity is given *in express terms* only for the purpose of setting aside fraudulent or voluntary conveyances, and, without legislative sanction, it would hardly be extended to unrecorded conveyances.[18] However, it is submitted that such an extension would carry out the manifest intention set out in § 5194 to place the lien and general creditors on a similar basis. It would also seem that where the statute has given a right, a suitable remedy should be found, if possible, to enforce the right.

Upon the death of the debtor, his general creditors can at once file a creditors' bill in equity to subject his estate to the payment of their claims.[19] Inasmuch as § 5194 in substance restores the title of the subject of the deed or conveyance to the "debtor-grantor" as to general creditors until the deed or writing is recorded, the general creditors can in this instance at once attack the unrecorded instrument in equity. The death of the debtor, in short, furnishes the general creditor with a remedy. Thus, in the case of *Dulaney* v. *Willis,*[20] as outlined above, general creditors because of the revisors' change could have the unrecorded deed of trust declared void as to them.

Hence, it appears that, while the section now declares that the unrecorded instrument is void as to general creditors until recorded, in actual practice, the only general creditor who may assail the instrument without first becoming a lien creditor is the general creditor of a deceased debtor.

Attention is called to the change in this section which provides that the writing must not only be admitted to record but must be indexed before the recordation will be sufficient.

E. W.

RECOGNITION OF ILLEGITIMATE CHILDREN—WHAT CONSTITUTES UNDER VIRGINIA CODE 1919, § 5269.—At common law, a child born out of wedlock was considered *quasi nullius filius* and could enjoy no rights of inheritance.[1] The legitimation of children so born

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[17] V. C. 1919, § 5186.

[18] McKeldin *v.* Gouldy, 91 Tenn. 677, 20 S. W. 231 (1892); and see Turrentine *v.* Koopman, 124 Ala. 211, 27 So. 522 (1900).

[19] Kennedy *v.* Creswell, 101 U. S. 641 (1879); and see Nunnally *v.* Strauss, 94 Va. 255, 26 S. E. 580 (1897); Finney *v.* Bennett, 27 Gratt. 365 (1876).

[20] *Supra.*

[1] Co. Litt. 123a; Rex *v.* Hodnett, 1 T. R. 96, 99 Eng. Rep. R. 993 (1786); Hains *v.* Jeffell, 1 Ld. Raym. 68, 91 Eng. Rep. R. 942.

could be effected only by special act of Parliament, and the earliest recorded instance of the passage of such an act was for the accommodation of John of Gaunt, whose four illegitimate children by Katherine Swinford were rendered legitimate by a special statute in the reign of Richard II. Although the English courts today appear to be somewhat more lenient in dealing with illegitimates, they have consistently refused to adopt the rule that the intermarriage of the parents confers legitimacy upon their bastard children, and the common law in that country remains virtually unchanged.

The civil law seems to have been less rigorous and more humane in its treatment of bastards. According to its doctrine, the intermarriage of a father with his concubine, by whom he had had a child, peremptorily rendered the child legitimate, irrespective of the consent of the father, mother, or even the child. But in this connection it should be recalled that under the civil law, concubinage was recognized for many purposes as a quasi marital relation; and therefore in the case of a child begotten by a father of a woman other than his concubine, the law was less generous to the child, requiring in addition to the intermarriage of the parents, that the father should receive the child into his family before he might be deemed legitimate.

In this country legitimation statutes were passed by a number of the States at an early date, and are now quite general. Some of these statutes require merely the intermarriage of the parents to legitimize children born out of wedlock; while others require in addition to the subsequent marriage, the recognition of the child by the father; and it is to this latter class that the Virginia statute, which it is our purpose here to consider, belongs. Section 5269 of the Virginia Code of 1919 provides as follows:

> "If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendents, if recognized by him before or after the marriage, shall be deemed legitimate."

Now the courts quite frequently and—it is submitted—properly have held, that since legitimation statutes are in derogation of the common law, they are to be strictly construed.[2] Moreover, where recognition is required, such recognition is a question of fact, the burden of establishing which fact rests on the person claiming legitimacy.[3] However, the presumption of legitimacy rather than illegitimacy has at all times been a strong one in the eyes of the law; and in determining what constitutes recognition of a bastard child by its putative father, the courts are wont to indulge this presumption to the full extent of its force. As was pointed out in the argument of the learned counsel for the appellee in *Ash* v. *Way's Admrs.*,[4] although our Virginia statute appears to belong to the

[2] Cope *v.* Cope, 137 U. S. 682 (1891); Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161 (1891); Pratt *v.* Atwood, 108 Mass. 40 (1871).

[3] Arndt *v.* Arndt (Kan.), 167 Pac. 1055 (1917); and see Hoover *v.* Hoover (Va.), 109 S. E. 424 (1921).

[4] 43 Va. 203 (1845).

more rigorous class of such legislation, the court in interpreting what facts will constitute recognition have virtually adopted the policy of the civil law. Where a statute requires recognition, it is quite generally held that the subsequent intermarriage of the parents after the birth of the child is evidence in support of recognition, provided that the marriage is voluntary, but not sufficient to constitute recognition by itself.[5]

In *Hoover* v. *Hoover*,[6] the Virginia Court was confronted fairly and squarely with the question of what constitutes recognition under the statute. In this case, shortly after the birth of the bastard child, the alleged father was arrested and threatened with prosecution under the seduction statute. He offered to compensate the mother by payment to her of three hundred dollars; but when this was refused, he voluntarily gave bail, and shortly thereafter married the mother, leaving the house the morning after the wedding. Some years later, proceedings were instituted by the child to establish her legitimacy. Upon a decision by the trial court in favor of the child, an appeal was taken. The evidence showed an abundance of contradictory testimony, conflicting on almost every essential point. But it appeared beyond dispute that upon being plainly and definitely accused of the paternity of the child by his uncle, the alleged father had failed to deny the charge; and also that he had told several witnesses that he would take care of the mother and child were it not for the objection of his father. Relying to a large extent on a case decided under the Indiana statute—the requirements of which are almost identical to those of our own—where it was laid down by the court that the recognition must be "clear, definite, and unequivocal," [7] the appellate court found the evidence insufficient to measure up to this criterion of recognition, and reversed the decision of the trial court. However, upon a rehearing being granted, although no new evidence was introduced, the appellate court reversed its former holding and held the appellee legitimate. The attitude of the court, reached after a thorough review of the evidence at the rehearing, is expressed with admirable lucidity in the following passages quoted from the opinion delivered by Judge Prentis:

> "The question, however, is not how often he denied it, but whether at any time he recognized the appellee as his child. Upon further reflection, we are satisfied that by his conduct, by *his silence when he should have spoken*, and by his words, he has recognized her as his child. * * * Conceding that there are reasons for a fair difference of opinion upon the vital question of fact here involved, every fair presumption should be indulged in favor of legitimacy rather than illegitimacy, and

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[5] Hoover *v.* Hoover, *supra;* and see Ash *v.* Way's Admrs., *supra;* Luce *v.* Tompkins, 177 Ia. 168, 158 N. W. 535 (1916).

[6] *Supra.*

[7] Campbell *v.* Carroll (Ind.), 124 N. E. 407 (1919).

in doubtful cases, in support of the judgment of a trial court." (Italics ours.)

It is both interesting and instructive to observe certain decisions in other States where the statute requires recognition, for the purpose of ascertaining just where Virginia stands on this question. Iowa has furnished a number of such cases, a few of which have been chosen as being particularly relevant to this discussion. In *Morgan* v. *Strand*,[8] it was held that where a father stated to several persons, "that he had a child back in Illinois," not naming the child or further identifying it, this was sufficient to constitute recognition. It was again held by the Iowa court, that where the mother resided in the home of the alleged father after the birth of the child, it was strong evidence in support of recognition, and when taken in conjunction with the father's statement that he had eight children, which number included the bastard, was sufficient to establish recognition.[9] And in a still later case it was held that where the father admitted that "he hated it but did not deny it" and the child was looked upon as his by the community generally, sufficient recognition was established.[10]

In California it was held that the confession of the father that the child was his, when made to the physician attending at the birth of the child, was adequate recognition.[11]

It will be borne in mind that in *Hoover* v. *Hoover, supra,* the court based its finding that the child had been recognized, on three grounds; the father's conduct, his silence when he should have spoken, and his words. As to his words, and indeed also as to his conduct, the testimony was so conflicting as to permit of reasonable doubt whatever the decision might have been. But as to the fact that the father was accused of the paternity of the child and failed to deny it, the testimony was more in accord; and upon this point the court laid considerable stress. If this had been the only ground upon which the decision rested, it could have been justly said concerning the Virginia Court, that it had gone "a bow shot" beyond any prior decision in this State in the matter of a liberal construction of what constitutes recognition. However, when it is considered; first, that this was but one of three points upon which the decision was made to rest; and second, that in the conflict of testimony on the other two points, the balance was allowed to be turned in favor of the appellee by the weight of the presumption of legitimacy, it will be necessarily concluded that this decision by the Virginia Court is in accord with previous decisions on similar questions.

T. M. B.

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[8] 133 Ia. 299, 110 N. W. 596 (1907)
[9] Luce *v.* Tompkins, *supra.*
[10] Trier *v.* Singmaster, 184 Ia. 307, 167 N. W. 538 (1918).
[11] *In re* Baird's Estate, 173 Cal. 617, 160 Pac. 1078 (1916).